LOW KEAN GIAP & ORS

v.

SHAIK ALAWDEEN SHAIK DAWOOD & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 23-405-1993]
22 JULY 1999

ROAD TRAFFIC: *Negligence - Collision between motor van and motor lorry - Circumstantial evidence - Liability - Upon whom*

DAMAGES: *Fatal accident - Dependency claim - Quantum - Civil Law Act 1956, s. 7*

A collision of a motor van and a motor lorry resulted in the death of three people and the injury of one, all of whom were occupants of the motor van. This action, based on s. 7 of the Civil law Act 1956 ('CLA'), were dependency claims in relation to two of the deceased. The 1st plaintiff, the husband of one of the deceased claimed for two of his infant children and himself. The 2nd and 3rd plaintiffs claimed as parents of the other deceased. The court had to decide on the issue of liability before proceeding to determine their respective claims.

Held:

[1] Based on the evidence of the 1st and 2nd defendants coupled with the sketch plan, the location of the glass fragments at the scene of the accident and the tyre marks of the motor lorry on the road taken gave rise to the conclusion that the collision occurred on the motor van's side of the road caused by the encroachment of the motor lorry driven by the 1st defendant. Thus, the 1st defendant was wholly negligent and was the sole author of the unfortunate accident.

[2] The earnings of the 1st plaintiff's deceased wife as a waitress in Mersing was computed at RM800 per month. The sum of RM400 was deducted as living expenses as required under s. 7(3)(iv)(c) CLA. Using the multiplicand of RM400 per month with the multiplier of 9 years, the sum of RM43,200 was awarded to the 1st plaintiff and his two children for the dependency claim. Further, the claim of employing a babysitter for the said children at the cost of RM300 per month was recoverable under s. 7(3) CLA. As such, with a multiplier of 6 years, the 1st plaintiff was awarded a sum of RM21,600 to this respect. Apart from this, damages for bereavement under s. 7(3A) CLA read with s. 7(3B)(a) CLA in the sum of RM10,000, funeral expenses being special damages in the

sum of RM3,000, cost of police report and post-mortem of RM14 and RM40 respectively were awarded.

[3] The fact that the 2nd plaintiff received income from his own business did not prevent him from being a dependent and rightful claimant for the loss of support as a result of his son's death under s. 7(2) CLA.

[3a] The legitimacy of the three businesses wherein the deceased son of the 2nd and 3rd plaintiffs received his income from was not doubted. It followed that s. 114(g) of the Evidence Act 1956 was not invoked to draw adverse inferences in regard to the failure to produce the relevant documents of the said businesses. The evidence of the 2nd and 3rd plaintiffs that they each received RM500 and RM1,000 monthly before the accident was accepted with "an open mind".

[3b] Using the multiplicand of RM500 per month with the multiplier of 7 years, the 2nd plaintiff was awarded a sum of RM42,000 whereas the 3rd plaintiff based on the multiplicand of RM1,000 per month with a multiplier of 7 years was awarded a sum of RM84,000. Further, damages for bereavement in the sum of RM10,000 was awarded to both plaintiffs together with funeral expenses at RM3,500 and cost of the post mortem report at RM40.

[Judgment for the 1st, 2nd and 3rd plaintiffs with interest awarded accordingly; costs to be taxed.]

Case(s) referred to:

Amar Singh v. Chin Kiew [1960] MLJ 77 ***(foll)***
Atyam v. Pechitti, A 1966 SC 629 ***(refd)***
Barton v. Armstrong [1976] AC 104 ***(refd)***
Blyth v. Birmingham Waterworks Co [1856] 11 Ex 781 ***(refd)***
Caparo Industries plc v. Dickman [1990] 2 AC 605 ***(refd)***
Chan Loo Khee v. Lai Siew San & Ors [1997] 1 MLJ 253 ***(dist)***
Chop Seng Heng v. Thevannasan & Ors [1975] 2 MLJ 3 ***(dist)***
Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix And Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government of Malaysia & Anor [1994] 1 CLJ 321 ***(foll)***
Debendra v. Narendra, 24 CWN 110 ***(refd)***
Friedeberg-Seeley v. Klass [1957] 101 SJ 275 ***(refd)***
GG in Council v. Ranglal A 1948 P 237 ***(refd)***
G Krishna Rao v. Chalasani Pooranchandra, A [1987] Ori 18 ***(refd)***
Grill v. General Iron Screw Collier Co [1866] LR 1 CP 600 ***(refd)***
Halijah v. Velaitham [1966] 1 MLJ 192 ***(refd)***
Irudayam v. Salayath, A 1973 M 421 ***(refd)***
Lim Gaw Teong & Anor v. Daniel & Anor [1968] 1 MLJ 277 ***(refd)***
Lochgelly Iron and Coal Co v. M'Mullan [1934] AC 1 ***(refd)***
Loh Chee Keong v. Syarikat Bee Huat Sdn Bhd & Anor [1982] 2 MLJ 184 ***(refd)***

Lynch v. Director of Public Prosecutions for Northern Ireland [1975] 1 All ER 913 ***(refd)***
Mallett v. McMonagle [1969] 2 All ER 178 ***(refd)***
Mat Desa Salleh v. Ang Hock Lee & Anor [1979] 1 MLJ 241 ***(refd)***
Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor [1982] 1 MLJ 82 ***(refd)***
Muhamad Hashim (Bapa Noor Azlan Muhamad (Simati) Bertindak Bagi Pihak Tanggungan) v. Teow Teik Chai & Anor [1996] 1 CLJ 615 ***(foll)***
MUI Bank Bhd Johor v. Tee Puat Kuang @ Tee Puat Kway [1993] 2 AMR 2111 ***(refd)***
Multar v. Lim Kim Chet & Anor [1982] 1 MLJ 184 ***(refd)***
Munusamy v. PP [1987] 1 MLJ 492 ***(refd)***
Neo Kim Soon (Pentadbir kepada Harta Pusaka Phanna Manneechuang, Simati) v. Subramaniam Ramanaidu & Anor [1996] 1 CLJ 730 ***(refd)***
Ng Aik Kian & Anor v. Sia Loh Sia [1997] 2 AMR 1996 ***(foll)***
Noor Famiza Zahri & Anor v. Awang Muda & Anor [1994] 2 CLJ 418 ***(foll)***
Ong Yam Chong & Anor v. Chan Wah [1962] 28 MLJ 184 ***(refd)***
Ooi Hock Leong v. R [1955] MLJ 229 ***(refd)***
Philipps v. Philipps [1878] 4 QBD 133 ***(refd)***
Pillai v. Dangal, A 1942 R 52 ***(refd)***
PP v. Lee Pak [1937] MLJ 265 ***(refd)***
Puteh Mahmood v. Ng Twee & Anor [1971] 1 MLJ 207 ***(refd)***
R v. Bone [1968] 2 All ER 644 ***(refd)***
R v. Gill [1963] 2 All ER 688 ***(refd)***
R v. Hudson, R v. Taylor [1971] 2 QB 202 ***(refd)***
Ramdas Oil Mills v. Union, A [1977] SC 638 ***(refd)***
Rangabati v. United Bank, A 1961 P 158 ***(refd)***
S v. Modern Cultivation, A 1965 SC 17 ***(refd)***
Selvaduray v. Chinniah [1939] MLJ 253 ***(refd)***
Srichand v. S [1967] AII SCC 450 ***(refd)***
Subramaniam v. PP [1956] 1 WLR 965 ***(refd)***
Tan Chye Choo & Ors v. Chew Kew Moi [1970] 1 MLJ 1 ***(refd)***
Thomas v. Quartermaine [1887] 18 QBD 685 ***(refd)***
Vinayak v. Collector of Bombay 26 B 339 ***(refd)***
Ware and De Freville Ltd v. Motor Trade Association [1921] 3 KB 40 ***(refd)***
Williamson v. Rover Cycle Co [1901] 2 IR 619 ***(refd)***
Yahaya Mat & Anor v. Abdul Rahman Abu [1982] 1 MLJ 202 ***(refd)***
Yahaya Mohamad v. Chin Tuan Nam [1975] 2 MLJ 117 ***(refd)***
Yuen Kun Yeu v. Attorney General of Hong Kong [1988] AC 175 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7, (2), (3), (3A), (3B)(a), 7(3)(iv)(a), (c)
Evidence Act 1950, s. 114, (g)
Rules of the High Court 1980, O. 42 r. 12

For the 1st, 2nd & 3rd plaintiffs - Datin Blanche Oleary; M/s Blance Kayveas & Co

For the defendants - RA Kumar; M/s Nijar, Kumar, Netto & Partners

Reported by Sherin Kunhibava/Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

At pp. 18 and 19 of the agreed facts in the bundle of pleadings marked as "AB", the parties agreed to the following set of facts. That on 30 September 1992 at about 7.00 p.m., Leong Poh Heng (hereinafter referred to as the "deceased") was driving a motorvan bearing registration number JCG 3868 together with three other passengers, namely Ng Yan Ling (hereinafter referred to as the "first deceased"), Ng Tat Chee (hereinafter referred to as the "second deceased"), and the fifth plaintiff from Mersing to Endau when at the 4th milestone of the Mersing/Endau road a motorlorry trailer bearing registration number BBK 6046 driven by the first defendant as an agent or servant of the second defendant and with the permission of the second defendant was travelling in the opposite direction from Endau to Mersing when a collision occurred between the two vehicles at the material time and place.

As a result of the said collision, the deceased, the first deceased, and the second deceased died whilst the fifth plaintiff by the name of Ng Ko Hoe sustained injuries. These untimely deaths brought about the following claims:

(i) the first plaintiff (Low Kean Giap) instituted dependency claim as the husband of the first deceased and this claim was for himself and his two infant children (Low Su Ghee and Low Yong Hun).

(ii) The second plaintiff (Leong Hock Seng) and the third plaintiff (Ling Gun Sang) instituted dependency claims as the parents of the deceased.

(iii) The fourth plaintiff (Ooi Swee Bee) instituted dependency claim as the wife of the second deceased.

In addition to that, the fifth plaintiff by the name of Ng Ko Hoe claimed for personal injuries through his mother and next friend Ooi Swee Bee.

On 7 June 1996, the fourth plaintiff (Ooi Swee Bee) and the fifth plaintiff (Ng Ko Hoe) compromised their claims on a without admission of liability basis and the chapters on them have closed. The only issues left to be determined by this court can compendiously be categorised as follows:

(a) liability between the driver of the motorvan who has since died and the driver of the motorlorry trailer who is still alive and kicking.

(b) quantum in respect of the claims of the first plaintiff (Low Kean Giap) and the second plaintiff (Leong Hock Seng) and the third plaintiff (Ling Gun Sang).

Liability

The plaintiffs' case, as pleaded in the amended statement of claim in bundle marked "AB" at para. 7(i), was that the motorlorry trailer driven by the first defendant had enroached onto the motorvan's lawful path that was driven by the deceased and thereby caused the collision.

Simply put, the defendants' case as pleaded in the re-amended defence in para. 5(1) of encl. 34, was that the motorlorry trailer was stationary when the motorvan collided into the said motorlorry trailer.

The plaintiffs' case drew its support and strength on the evidence of SP1 (Corporal 94263 Mazli bin Abdul Aziz) as well as the evidence of SP2 (Chief Inspector Zulkiply bin Yazam). The testimonies of both SP1 and SP2 showed that the motorlorry trailer and the motorvan were found on the right side of the road as one faces the direction of Mersing as shown in the sketch plan marked as exh. (P1) with the key (P1K) thereto. Based on the positions of the respective vehicles as reflected in exh. (P1), the plaintiffs' stand were that by inference the second defendant's motorlorry trailer that was driven by the first defendant had suddenly encroached into the deceased's lane while the deceased was driving the motorvan and, consequently, collided into the motorvan. The glass fragments of the said collision too were located at the right side of the road on the deceased's right of way towards the direction of Endau. According to SP1, the brake marks from the tyres of the motorlorry trailer started at the motorlorry trailer's side of the road marked as "I" in the sketch plan (P1) and ended on the deceased lawful path of the road at point marked as "J" in the sketch plan (P1). The brake marks of the motorlorry trailer measured 39 feet long as shown in the key thereto (P1K). SP1 in his evidence was quite categorical when he said that it was he who investigated the case and it was he who prepared the sketch plan and the key. As to the value of the sketch plan drawn by the investigating officer together with the value of the photographs taken by the Government Chemist, it was alluded to in the case of *Noor Famiza Zahri & Anor v. Awang Muda & Anor* [1994] 2 CLJ 418 where at p. 421, I categorically said that:

> The sketch plan drawn by the investigating officer serves a useful purpose, for from it certain inferences can be drawn to formulate the plaintiffs' case of negligence against the first defendant. Now, the glass fragments located on the plaintiffs' correct side of the road would undoubtedly show that the first

defendant had encroached into the path of the deceased. The first defendant must have sped as the damages to the motorcar was extensive and the tyre marks of the military truck measured 51.80 metres. Even the right hand door of the motorcar came off and landed some distance away from the motorcar. The photographs of the motorcar (see supplementary agreed bundle of documents at "C1"), taken by the Government Chemist showing the front and offside view of the motorcar, show the extent of the damages as a result of the accident. In his brief report, the Government Chemist concluded that:

'... the motor truck and motorcar did come into collision with one another'.

Of course, in the present case the photographs were not taken by the Government Chemist but all the same the photographs at pp. 17 to 21 of bundle "AC" were referred to by SP1 when he took the stand. Page 20 of bundle "AC" showed the extent of the damage to the motorvan which was concentrated at the front portion of the driver's side and indeed this was also the tenor of the evidence of SP1. The close up view of the photograph of the damaged motorvan at p. 18 of bundle "AC" was more gruesome. The motorlorry trailer, on the other hand, was badly damaged on its front left as seen in the two photographs at p. 19 of bundle "C" and this was also the evidence of SP1. In *Noor Famiza's* case, it was the encroachment of the military truck into the motorcar's correct side of the road that caused the death of the driver of the motorcar. At p. 412 to p. 422 of the report in the *Noor Famiza's* case, I said as follows:

The accident happened during the fasting month. The first defendant was driving continuously (except for a short break in order to break his fast) for approximately 6 hours. During the early part of the journey, the first defendant and the rest of the convoy had to go through muddy terrain and the first defendant's military truck got stucked in the mud. It is reasonable to infer that the first defendant must be tired that night. Even his fellow passenger, Saad bin Yahya (SD2) agreed that he spoke to the first defendant to prevent lethargy. In that atmosphere, the first defendant saw some 200 metres away the lights of the motorcar from the opposite direction. He said he quickly reduced his speed and controlled his military truck. Now, if the first defendant did what he said he did, the two vehicles would not have collided with one another. The motorcar was on its correct side of the road at the material time. To enable the collision to occur would simply mean that there was encroachment by the first defendant into the path of the motorcar. That must have been and the only probable conclusion that can be deduced from the available evidence. It follows therefore that negligence should be placed entirely on the first defendant.

Likewise in the present case, the encroachment of the motorlorry trailer into the lawful path of the motorvan which resulted in the collision and the deaths of the personalities earlier referred must be the only inference that can be drawn by looking at the sketch plan (P1) and the key thereto (P1K) together

with the glass fragments. Any other inference would be perverse in the circumstances. SP2 who took over the investigation from SP1 corroborated the evidence of SP1. SP2 testified that the stretch of the road in question was straight, hilly and twisting – all rolled in one. According to SP2, from Endau to Mersing the gradient of the road was hilly and twisting. The hilly gradient of the road must be twisted to the left from Endau to Mersing by looking at the sketch plan. In short, what SP2 testified was quite crucial. SP2 testified that the motorlorry trailer coming from Endau was going down a hill. SP2 testified further that the motorvan was travelling on a straight road and the accident occurred below a hill.

Surprisingly, the first defendant (SD1) in his police report as seen at p. 28 of bundle "AC" admitted that he was unable to control the motorlorry trailer when it encroached into the deceased's lawful path thereby colliding against the motorvan driven by the deceased. Somehow the version of the accident as narrated by SD1 in open court when he took the stand was entirely inconsistent and ran counter to the police report lodged by him. SD1 testified that he was scared and he was forced by four Malay individuals to lodge that police report and that the version given by him in court was the correct version. But alas, under cross-examination SD1 admitted that he did not lodge a police report in regard to the Malay individuals that harassed him. It can safely be concluded that the story that SD1 was under duress when he lodged that police report in regard to the accident was nothing more than a mere concoction, an after thought of the highest degree.

I need to say something about duress. In *Lynch v. Director of Public Prosecutions for Northern Ireland* [1975] 1 All ER 913, [1975] 2 WLR 641, HL, it was held that duress meant that the will of the defendant was overborne by threats of death or serious personal injury. Duress of an individual may consist in violence to that individual, or threats of violence, or in imprisonment whether actual or threatened (*Friedeberg-Seeley v. Klass* [1957] 101 SJ 275; and *Barton v. Armstrong* [1976] AC 104). At common law, duress, or what is usually referred to as legal duress, means actual violence or threats of violence to the person. The case of *Ware and De Freville Ltd v. Motor Trade Association* [1921] 3 KB 40 says that the threat must be illegal in the sense that it must be a threat to commit a crime or a tort. Here, there was no evidence at all that SD1 was threatened by the four Malay individuals to the extent that SD1's life was at stake or that SD1 would suffer serious personal injury or that SD1 was threatened with violence. It must be emphasised that a threat of lesser harm will not suffice (*Lynch v. Director of Public Prosecutions for Northern Ireland [supra]*), and from the available evidence SD1 did not elaborate as to why he was afraid of the four Malay individuals. If it was true that SD1 was threatened to lodge that kind of police report, surely SD1 would protect himself by lodging a police report against those four

Malay individuals. There was no evidence at all to show to what extent SD1 voluntarily placed himself under the dominance of the four Malay individuals when that threat was extended to him. Neither was there evidence to show that it was open to SD1 to withdraw himself from the situation that created the threat (*Lynch v. Director of Public Prosecutions for Northern Ireland [supra]*). Of crucial importance was whether at the time of lodging the police report as alleged by SD1 the threat of death or serious injury was operative and effective (*R v. Hudson, R v. Taylor* [1971] 2 QB 202, [1971] 2 All ER 244, CA) and, sad to say, the available evidence was lacking in this direction. In my judgment, SD1 did not lay a proper foundation to trigger the defence of duress (*R v. Gill* [1963] 2 All ER 688, [1963] 1 WLR 841 CCA; *R v. Bone* [1968] 2 All ER 644, [1968] 1 WLR 983 CA; and *Subramaniam v. PP* [1956] 1 WLR 965 PC).

The defendants did not dispute at all the respective positions of the vehicles after the accident as reflected in the sketch plan together with the key thereto. Indeed the courts have since time immemorial placed great emphasis on the sketch plans and the keys to make the correct inferences and arrive at the relevant conclusions thereto. In *Lim Gaw Teong & Anor v. Daniel & Anor* [1968] 1 MLJ 277, the court there unhesitantly held that the police key and the sketch plan established beyond doubt that the collision occurred fairly close to the plaintiff's correct side of the road by drawing an inference to that effect and relying solely on the presence of petrol stains and broken pieces of glass on the plaintiff's side of the road. Syed Othman FJ stressed the importance of the sketch plan in *Multar v. Lim Kim Chet & Anor* [1982] 1 MLJ 184, 185 FC in these lucid words:

> The first respondent's report, on the other hand, is at variance with his evidence in court and the sketch plan. In the report he said he stopped the lorry when he heard someone knocking into the rear of the lorry. In court he said the motorcycle collided with the right side of the lorry. The sketch plan clearly shows that the motorcycle was at the right side of the lorry close to the right edge of the road with the front wheel almost near the driver's cabin of the lorry. From this we can only assume that the motorcycle must have moved forward slightly after being hit by the lorry.

Drawing the necessary inferences from the sketch plans have been entrenched in our courts and it will continue to be so for a long time to come (*Mohamed Salleh bin Awang & Anor v. Low Han Leong & Anor* [1982] 1 MLJ 82 FC).

The defendants here took a different course of action when they knew that they could not demolish the sketch plan and the key thereto. Instead the defendants stood their ground and sought to explain as to why the motorlorry trailer was in the position as depicted in the sketch plan (P1). The defendants

through SD1 (the first defendant) testified that the motorlorry trailer driven by him (SD1) had developed trouble with its transmission (inability to engage its gear) and that the motorlorry trailer was towed for some distance by a passing motorlorry. When the motorlorry trailer had arrived at the top of the hill, the first defendant had dismantled the tow and had free-wheeled down the hill. It must be emphasised that according to SD1, wire was used to tow the motorlorry trailer. Whilst free-wheeling down the hill towards Mersing, the first defendant (SD1) testified that the steering mechanism jammed forcing the motorlorry trailer to move to the right as it came down the hill. According to SD1 he then applied the brakes of the motorlorry trailer and it stopped on the opposite lane and at the side table of the opposite lane. Thus far there was admission that there was an encroachment. SD1 continued further to testify and he said that when the motorlorry trailer had stopped at the side table of the opposite lane, he alighted and placed a triangular warning sign at the rear portion of the motorlorry trailer. SD1 then switched on the hazard lights and the lights of the motorlorry trailer and he then went to the rear of the motorlorry trailer. It was at this time, according to SD1, that he heard a loud noise and he turned to see and saw that the front left portion of his motorlorry trailer was stuck to the front right side of the motorvan. In his testimony, SD1 explained that after the collision the motorvan landed on the front bonnet of the motorlorry trailer. But this piece of evidence was not supported by the sketch plan nor by SP1 and SP2. SD1 also explained that his testimony was at variance with his police report at p. 28 of bundle "AC" because he had been threatened by four Malay individuals and he had made the police report in those terms under duress. SD1 also emphasised that he gave a statement to the police a week after the accident and he had told the police what he had said in court. Unfortunately, we do not know what SD1 said in his statement as SP2 under cross-examination at p. 20 of the notes of proceedings categorically stated that he did not bring the statement to court and the matter was left at that. It was argued by Mr. RA Kumar, learned counsel for the defendants, to the effect that the first defendant's explanation in regard to the variance of his testimony with the police report was wholly plausible as it was corroborated by the following facts:

(1) SP2 did not deny that SD1 had subsequently complained that he was threatened to make the police report.

(2) SP1 under cross-examination confirmed that there was no sign of any chain being entangled with the motorlorry.

(3) Exhibit "DID3", a document from the Road Transport Department, showed that the steering mechanism of the motorlorry trailer was faulty at the time of examination.

I have since perused through the notes of evidence in regard to point (1) above, and I found two questions that were put across under cross-examination of SP2 that ought to be reproduced here (my own translated version) [see p. 20 to p. 21 of the notes of evidence in its original Bahasa Malaysia's text]:

Question: In this case the driver of the motorlorry trailer was forced to make the report as per "AC" of page 28?

Answer: I do not know.

Question: Did the driver of the mororlorry trailer complain to you that he was forced to make the report as per "AC" of page 28?

Answer: I can't remember.

These pieces of evidences whittled down the submission that SP2 did not deny that SD1 had subsequently complained that he was threatened to make the police report. A correct appraisal of the evidence would indicate that SP2 did not know that the driver of the motorlorry trailer was forced to lodge that police report and that SP2 could not remember whether the driver of the motorlorry trailer had complained to him that he (the driver in question) was forced to lodge that police report.

In regard to point (2) above, it must be read in relation to the police report lodged by SD1 where the chain was used to pull the motorlorry trailer with the assistance of another motorlorry. While it is true that SP1 testified at p. 14 of the notes of evidence that there was no chain tied to the motorlorry (this must be in reference to the motorlorry trailer), yet SP1 was not asked the purpose of using that chain. It must not be forgotten that SD1 in his testimony used the word **"wire"** to pull the motorlorry trailer and not the word **"chain"**. In the police report, SD1 categorically stated that the chain was broken and it got entangled with the front tyre. In court, SD1 testified that the motorlorry trailer was towed by another motorlorry and when it reached the top of the hill, SD1 had dismantled the tow and had free-wheeled down the hill. That being the case, it was not surprising that SP1 testified that he did not see a chain tied to the motorlorry trailer.

In regard to point (3), if it was raised to show the latent defect of the motorlorry trailer it cannot be accepted by this court. No evidence was led at all by the defendants by adducing evidence from their mechanics nor was there evidence emanating from SD1 in relation to the maintenance of the motorlorry trailer. There was no evidence at all in regard to the daily, monthly or even periodical maintenance of the motorlorry trailer to assist this court to arrive at the conclusion that the steering mechanism was suddenly faulty without the negligence on the part of SD1 or even SD2. Exhibit "DID3" was prepared after the accident by the Road Transport Department and that report was so brief that this court cannot conclude that the steering mechanism of the

motorlorry trailer was faulty because of latent defect. Exhibit "DID3" too did not use the language **"latent defect"**. Incidentally, the Amended Statement of Defence in enclosure 34 did not raise the defence that the motorlorry trailer had a latent defect in its steering mechanism. As Brett LJ in *Philipps v. Philipps* [1878] 4 QBD at p. 133 aptly puts it:

> If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial any fact which is not stated in the pleadings.

I venture to say that every party must be alert and must plead all material facts on which the party proposes to rely at the trial, otherwise that defaulting party is not entitled to give any evidence of them at the trial. In short, every averment must be pleaded and no averment must be omitted which is essential to success.

Be that as it may, when one talks of latent defect the case of *Tan Chye Choo & Ors v. Chew Kew Moi* [1970] 1 MLJ 1 PC, immediately comes to mind. In that case the Privy Council exonerated the defendant from blame when the collision happened because of a latent defect in a taxi of which the defendant without any negligence on her part was unaware. The Privy Council also exonerated the defendant as there was no evidence that the defendant or her servant or her agent had been guilty of negligence in relation to the maintenance of the motor taxi. But the facts in the present case are easily distinguishable. The defence of latent defect to the steering mechanism of the motorlorry trailer was not pleaded at all in the amended statement of defence.

An argument was advanced that the plaintiffs have merely established that the motorlorry trailer was found on the wrong side of the road at the time of the accident. It was also argued that the defendants have discharged their onus by explaining as to how the motorlorry trailer came to be on the wrong side of the road – to be precise on the lawful path of the motorvan. It was also argued that there was nothing inherently improbable in the version as advanced by the first defendant – SD1. Put differently, the defendants held onto the notion that by putting SD1 on the stand and giving oral evidence the defendants have discharged the onus placed on them in explaining the position of their motorlorry trailer on the adverse side of the road and therefore there was no negligence on the part of SD1. With respect, this submission was totally untenable as it failed to take into account the fact that the oral testimony of SD1 in regard to the version of the accident was inconsistent with SD1's police report that was lodged on 30 September 1992 at 8.40 p.m. as reflected at p. 28 of the bundle marked as "AC". It must be recalled that the accident took place on 30 September 1992 at about 7.00 p.m., and thus when SD1 lodged that police report his memory of that terrible episode must have been fresh in his mind and there was no time for concoction. SD1 sought

to explain that he lodged that police report under duress exerted on him by the four Malay individuals. Yet, SD1, as I said, saw it fit not to lodge any police report in regard to that four Malay individuals. It is difficult to visualise that the four Malay individuals would threaten SD1 to lodge that kind of police report as the victims of the accident were not even related to them. Even the defendants were not related to the four Malay individuals. SD1 admitted under cross-examination that the police report was read to him by the police and SD1 had signed that police report forthwith. So when the police read back the police report to SD1, there was ample opportunity for SD1 to mention in his police report that the four Malay individuals were instrumental for the way that police report was lodged. This was never done. In my judgment, when SD1 lodged that police report there was no duress exerted on him by anyone. SD1 lodged that damning police report on his own free will.

Next, it was argued that this court must consider whether the defendants were wholly liable for negligence or whether liability ought to be apportioned between the deceased and the first defendant (SD1). At p. 13 of the notes of evidence, SP1 testified that he arrived at the scene of the accident at about 6.55 p.m. and it was not dark. Thus, it can be implied that at the time of the accident the area was not dark and visibility would have been good. Using these set of facts, the defendants relied heavily on the authority of *Chan Loo Khee v. Lai Siew San & Ors* [1997] 1 MLJ 253 and argued that the motorlorry trailer was parked by the side of the road and had its hazard lights on and, consequently, SD1 could not have reasonably foreseen that his act would have caused the accident. I must at once say that the defendants were too presumptious in thinking that this court would accept their version as to how the motorlorry trailer ended up on the deceased side of the road. Even if the first defendant's testimony [testimony of SD1] of the version of the accident was accepted by this court, the fact that the first defendant allowed the motorlorry trailer to travel down a hilly slope without proper safety precautions notwithstanding the fact that the first defendant knew that the motorlorry trailer had developed engine trouble was in itself an inference of negligence. As the motorlorry trailer went down the hilly slope, the first defendant lost control of the vehicle entirely. I will now examine the facts of the case of *Chan Loo Khee [supra]*. That was a case involving three motorcars. The accident happened near Tanjong Malim where the road was straight and of good width. One of the motorcars was a Volkswagen driven by a schoolmaster who was returning home after a holiday in Kuala Lumpur. The second car was an Opel proceeding in the opposite direction towards Kuala Lumpur. The third was a Fiat car bound for Kuala Lumpur which the trial judge found as a fact to be stationary on the carriageway at the time of the accident. The learned trial judge found that the Fiat car was so parked with its side lights on, but held that "in this position and in the circumstances of the accident, it could not

and did not constitute such an obstruction to the Opel as to have contributed to the accident." The learned trial judge too found the driver of the Opel wholly to blame for the accident and dismissed the claim for contribution by the driver of the Opel against the driver and owner respectively as third parties. On appeal, the Federal Court by a majority dismissed the appeal (Gill and Ali FJJ gave concurring judgments, while Ong CJ dissenting) and held that in the circumstances of the case, the driver of the Fiat car was not guilty of negligence in parking his Fiat car on the road side with its parking lights on, as he could not have reasonably foreseen that his act in doing so would cause the accident. The Federal Court held that the trial judge was right in holding that the driver of the Opel car was wholly to blame for the accident.

The trial judge in *Chan Loo Khee* found as a fact that the Fiat car was stationary on the carriage-way at the time of the accident with its side lights on. In the present case, I found as a fact that the motorlorry trailer was not stationary and was not parked with its hazard lights on at the adverse side of the road at the time of the accident. This was my judgment and I so hold accordingly. It was also my judgment that SD1 was wholly negligent and the sole author of that unfortunate accident. I too hold as a fact that the accident happened in the way as described by SD1 in his police report which he lodged on 30 September 1992 at 8.40 p.m. For convenience, that police report is now reproduced hereinunder:

> Pada jam lebih kurang 5.00 petang 30.9.92 saya bertolak dari Felda Selendang Rompin dengan memandu motorlori No. BBK 6046. Pada jam lebih kurang 7.00 petang 30.9.92 setiba di batu 4 Jalan Mersing Endau motorlori BBK 6046 telah rosak. Saya telah menahan sebuah motorlori balak nombor tidak ingat dan minta tolong tarik dengan mengunakan rantai. Setelah diikat dengan rantai lori saya pon ditarik dan tiba-tiba rantai tersebut putus dan terbelit di bahagian roda hadapan. Pada masa itu sebuah motorvan nombor tidak ingat yang datang dari arah Mersing lalu saya tidak dapat mengawal motorlori saya dan terlanggar motorvan tersebut. Saya mempunyai lesen Kelas D, E No.D877662 tarikh tamat tempoh pada 25.9.93 dan lesen pengangkutan barang-barang No.516368 tamat tempoh 25.9.93. Semasa kejadian saya terus meninggalkan tempat kejadian kerana takut dipukul orang kampong dan datang balai buat pengaduan.
>
> Sekian laporan saya.

It was also my judgment that based on the evidence of not only SP1 but also SP2 coupled with the sketch plan at exh. (P1) and the location of the glass fragments at the scene of the accident together with the tyre marks of the motorlorry trailer on the road as seen in exh. (P1) – all these taken cumulatively irresistibly gave rise to one conclusion only. That conclusion was this. That the collision occurred on the deceased side of the road which was caused by the encroachment of the motorlorry trailer that was driven by the

first defendant – SD1. Even in his police report, SD1 admitted that he was unable to control the motorlorry trailer when it encroached into the deceased's lawful path at the time of the collision.

Undeterred, it was argued that the Privy Council in *Chop Seng Heng v. Thevannasan & Ors* [1975] 2 MLJ 3 disagreed with the majority view in *Chan Loo Khee's* case and had agreed with the dissenting judgment of Ong CJ which found the stationary Fiat car to be 20% liable. So it was submitted that at the most the first defendant would be liable at 25% for this unfortunate accident while the driver of the motorvan – the deceased was liable at the proportion of 75%.

In my judgment, the facts of *Chan Loo Khee* and *Chop Seng Huat* are wholly distinguishable from the facts of the present case. As I said in *Chan Loo Khee* there were three vehicles involved in the accident with one vehicle travelling on the opposite direction. In *Chop Seng Huat*, there was hardly any dispute that the stationary lorry was collided into by the travelling lorry when the stationary lorry was parked on its correct side of the road. In the present case before me, only two motor vehicles were involved and the defendants' motorlorry trailer was in the adverse side of the road – right smack in the lawful path of the motorvan. In my judgment, there was grave doubt as to whether the motorlorry trailer was in a parking position at the material time of the accident bearing in mind that in the first defendant's police report he did not state that the motorlorry trailer driven by him was parked at the material time of the accident but rather what was stated by the first defendant in the police report was that he had lost control of the motorlorry trailer and as a result the collision occurred. It is now apparent that the first defendant gave two different versions of the accident. One version was the version as stated in the police report. The other version was the version advanced by the first defendant – SD1, when he took the stand and gave oral testimony. In my judgment, the first defendant's version in his police report was more probable as that police report was made 1 hour 40 minutes after the accident where the events were still fresh in his mind. The police report clearly showed that the first defendant lost control of the motorlorry trailer causing it to encroach into the deceased's lawful path and a collision soon followed. In my judgment, the version that the motorlorry trailer was parked at the adverse side of the road at the time of the accident was inherently incredible as it ran counter to the first defendant's police report. The motorlorry trailer must have travelled down the hilly slope at a fast speed. According to the Road Transport Department reports on the two vehicles, both the front windscreens or windshields of the two vehicles were broken (see exh. "DID2" for the motorvan and exh. "DID3" for the motorlorry trailer). At point "G" in the sketch plan it indicated the position of broken pieces of glass fragments and

in my judgment this was the point of impact between the two vehicles. These broken pieces of glass fragments were from the front windscreens or windshields of both vehicles (*Mat Desa Salleh v. Ang Hock Lee & Anor* [1979] 1 MLJ 241, 241; *Yahaya Mat & Anor v. Abdul Rahman Abu* [1982] 1 MLJ 202, 203 FC; and *Loh Chee Keong v. Syarikat Bee Huat Sdn Bhd & Anor* [1982] 2 MLJ 184, 185). The impact on collision must have been tremendous as the reports from the Road Transport Department suggested. That the motorlorry trailer sped down the hilly slope can never be doubted as the brake marks of the motorlorry trailer from "I" to "J" of (P1) measured 39 feet. I placed great importance on these brake marks as they showed the violent braking of the motorlorry trailer by the first defendant. These brake marks too corroborated the plaintiffs' version as seen in the amended statement of claim marked as "AB" at para. 7(i) to the effect that there was encroachment by the motorlorry trailer into the lawful path of the motorvan. The cases of *Yahaya Mohamad v. Chin Tuan Nam* [1975] 2 MLJ 117, 123 PC; *Mohammed Salleh bin Awang & Anor v. Low Han Leong & Anor [supra]*; *Ong Yam Chong & Anor v. Chan Wah* [1962] 28 MLJ 184, 185 and *Halijah v. Velaitham* [1966] 1 MLJ 192, 194 are classical examples of the relevance and importance of brake marks and references to them are highly recommended. Be that as it may, the deaths to the three personalities and the personal injuries sustained by the fifth plaintiff were due to the sole negligence of the first defendant (SD1) – the driver of the motorlorry trailer. Negligence is in plain language the omission to do something which a reasonable man, guided by those considerations which regulate the conduct of human affairs, would do, or to do something which a prudent and reasonable man would not do (*Blyth v. Birmingham Waterworks Co* [1856] 11 Ex 781, 25 LJ Ex 212, 4 WR 204). But this definition as propounded by Alderson B in *Blyth's* case is outmoded and obsolete as it does not recognise the existence of a duty to take care and, consequently, it does not consider the degree of care that is required under the law. In *Thomas v. Quartermaine* [1887] 18 QBD 685 at p. 694, Bowen LJ succinctly said:

> The ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody.

and I must confess that that summarises the meaning of the word "negligence". Going into the heart of the matter, Willis J once said in *Grill v. General Iron Screw Collier Co* [1866] LR 1 CP 600 at 612 that: "It is really the absence of such care as it was the duty of the defendant to use." Lord Wright in *Lochgelly Iron and Coal Co v. M'Mullan* [1934] AC 1 at 25 in refined language add mileage to the meaning of the word "negligence" when his Lordship said:

> In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing.

It is purely a question of law whether or not there exists a duty of care. An action in negligence must necessarily fail if the plaintiff fails to establish the existence of a duty of care. Indeed negligence is also said to be a failure to exercise due care where a duty to take care exists. After the decision of the Privy Council in *Yuen Kun Yeu v. Attorney General of Hong Kong* [1988] AC 175, the law developed rapidly. Four separate steps emerged to determine the issue of the duty of care. Firstly, it must be reasonably foreseeable that the conduct of the defendant will cause damage to the plaintiff. Secondly, there must be sufficient "proximity" between the parties. Thirdly, as Lord Bridge in *Caparo Industries plc v. Dickman* [1990] 2 AC 605 at 617 said: "… the situation (must) be one in which the court considers it fair, just and reasonable that the law should impose a duty of care of a given scope on the one party for the benefit of the other." Fourthly, there must not be a ground of public policy to exclude the duty of care. In my judgment, on the facts, the first defendant (SD1) was wholly negligent. The four separate steps when applied to the facts of the present case would propel to the forefront the negligence of the first defendant (SD1) in all its splendour. To me this was a classical case of negligence at its height and nothing else. The deceased as the driver of the motorvan, on the other hand, did not contribute to the accident at all. He was not part author of the accident that led to his death. For these varied reasons, I hold and it was my judgment that the first defendant – SD1, was wholly liable in causing the accident. The first defendant was the sole author of the unfortunate accident.

Quantum

The First Plaintiff (Low Kean Giap)

This was a claim by the husband for himself and for his two infant children under s. 7 of the Civil Law Act 1956 together with special damages. The first plaintiff (SP3) gave evidence and in his evidence he confirmed that he was the husband of the first deceased (Ng Yan Ling) since 1979 and that union gave rise to two infant children by the names of Low Su Ghee and Low Yong Hun. This piece of evidence was amply supported by the marriage certificate and the birth certificates of the children as seen at pp. 1, 2 and 3 of bundle "AC". From the evidence of SP3 and the death certificate of Ng Lan Ying at p. 4 of bundle "AC", the age of the first deceased was listed at 37 at the time of her untimely death.

SP3 testified that prior to the death of the first deceased she worked as a waitress in the second plaintiff's (Leong Hock Seng's) restaurant in Mersing and received a monthly income of RM1,500. It must be stressed that the evidence of SP3 in regard to the employment and income of the first deceased was at first blush supported by the evidence of her employer, namely the second plaintiff (SP4). That was the first impression but as the evidence unfolded the evidence of SP4 was left much to be desired. SP3's evidence makes for interesting reading. SP3 testified that prior to the death of his wife, he used to receive a sum of RM600 per month from her as contribution and between RM300 to RM400 monthly for the daily expenses of their children. I accept and it was my judgment that based on the evidence of SP3 and SP4, the first plaintiff and the two children are the dependants of the first deceased under s. 7 of the Civil Law Act 1956. Based on the evidence as adduced, it was submitted that the loss of dependency of the first plaintiff should be computed at RM800 per month as the multiplicand with the multiplier of nine years which gave a total of RM86,400 as damages for loss of support. But it must not be forgotten that SP3 was unable to produce any credible evidence of his late wife's employment or earnings at the time of her death. It must be borne in mind that although SP4 categorically said that he employed the first deceased at a salary of RM1,500 per month yet SP4 had the audacity to say that the restaurant was closed soon after the accident. SP4 was unable to give particulars of registration of the restaurant business nor the particulars of the premises (see pp. 42 and 45 of the notes of evidence) and SP4 claimed that all the relevant documents have been burnt. Of pertinence would be the evidence of SP4 when he said that the restaurant business was experiencing losses.

SP4 further testified that he was the proprietor of Syarikat Yeun Sheng Trading and he had signed a letter dated 10 January 1995 (exh. "D7") where he confirmed that the deceased was employed as a waitress in his restaurant from 4 October 1991 to 30 September 1992 at a salary of RM1,500 per month and that letter bore the stamp chop of Yuen Sheng Trading, 12, Jalan Dato' Mohd Ali, 88900, Endau, Johor. If exh. "D7" meant to confirm the employment of the deceased with SP4's restaurant it should have carried the stamp chop of the said restaurant and not that of Yuen Sheng Trading. Be that as it may, SP4 testified further and he said that his firm did not employ the deceased but SP4 still maintained that the deceased was employed in the restaurant where he was a partner. In my judgment, the evidence of SP4 was not credible enough. SP4 did not know the name of the restaurant and was unable to provide the particulars of the premises. SP4 too could not provide the particulars pertaining to the registration of the restaurant business, its de-registration and to add insult to injury SP4 unabashedly said that he had burned the documents. SP4 even went to the extent of issuing that letter in exh. "D7"

to bolster up the first plaintiff's claim under s. 7 of the Civil Law Act 1956. Must this court believe the evidence of SP4?

SP3 testified further and he said that before the deceased moved to Mersing, the deceased was working in a factory called **"Mei Ya"** or **"Beautiful Asia"** (see p. 29 of the notes of evidence) and she was earning RM1,000 per month. SP3 gave an undertaking to produce the Statement of Accounts from the **"EPF"** [Employment Provident Fund] (see p. 30 of the notes of evidence) but somehow he only produced the EPF statement for 1990 when the deceased was working with Pen Apparel Sdn Bhd (exh. "D8"). The EPF of the deceased when she was employed by Pen Apparel Sdn Bhd based on 20% contribution showed the following particulars:

January	-	RM400
February	-	RM425
March	-	RM400
April	-	RM465
May	-	RM165
June	-	RM100

The EPF account further showed that since July 1990 the deceased was no longer in the employment of Pen Apparel Sdn Bhd.

Without a doubt, the first plaintiff was given more than adequate opportunity to produce the EPF Statement for 1992, the year when the deceased died, and the year when the deceased was alleged to have quit her job at "Beautiful Asia" but those documents have not been tendered even though admittedly those documents were in the first plaintiff's possession. I have no choice but to invoke s. 114(g) of the Evidence Act 1950 against the first plaintiff (*Munusamy v. Public Prosecutor* [1987] 1 MLJ 492, 494 (SC); *Public Prosecutor v. Lee Pak* [1937] MLJ 265; *Selvaduray v. Chinniah* [1939] MLJ 253, 256 (CA); *Ooi Hock Leong v. R* [1955] MLJ 229; and *MUI Bank Bhd Johor v. Tee Puat Kuang @ Tee Puat Kway* [1993] 2 AMR 2111, 2117).

SP3 further testified that the monies were sent by the deceased by way of bank drafts but SP3 failed to call his brother-in-law who was alleged to have received the bank drafts. The overall scenario of the evidence of SP3 may be summarised as follows:

(a) the deceased was working in Pen Apparel Sdn Bhd for a salary approximately in the region of RM400 until June 1990;

(b) since June 1990, there was no evidence to show that the deceased having worked in "Beautiful Asia" or elsewhere for that matter by simply looking at the EPF records;

(c) the deceased was alleged to have worked in the restaurant at Mersing some two months prior to the accident but there was no supportive cogent documentary evidence of any kind to support SP4's rather brash and bold assertion that he was the deceased's employer; and

(d) this was a case of this court having to consider whether to accept SP4's evidence that the deceased worked as a waitress in the restaurant at Mersing.

It was the submission of Mr RA Kumar that the allegation that the deceased worked in Mersing as a waitress was a mere concoction. Datin Blanche Oleary, learned counsel for the plaintiffs, took an opposite view and she submitted that this court ought to accept the evidence of SP4. Mr RA Kumar even went to the extent of submitting that the evidence of SP4 in regard to the deceased working in the restaurant was a total fabrication. He submitted further that the first plaintiff had failed to discharge the burden imposed on him by s. 7(3)(iv)(a) of the Civil Law Act 1956 by showing that the deceased was receiving earnings by her own labour or other gainful activity prior to her death. And so, the stand of Mr RA Kumar was that the plaintiff's claim for loss of support or dependency claim ought to be dismissed.

Now, the purpose of a dependency claim is to provide the widower and dependants with some capital sum which would with careful management would be sufficient to provide them with the material benefits of the same standard and length of time as would have been provided for them out of the earnings of the deceased had she not been killed by the encroachment and collision of the motorlorry trailer against the motorvan. *Mallett v. McMonagle* [1969] 2 All ER 178 is a classic example of a dependency claim. But a word of caution must be registered. Only certain people could sue under s. 7 of the Civil Law Act 1956. Thus, parents and spouses and dependant children of the deceased could sue under the head of dependency claim. A stepfather or a stepmother cannot be termed as a "parent" under the Civil Law Act 1956 (*Puteh bin Mahmood v. Ng Twee & Anor* [1971] 1 MLJ 207).

This was purely a case of whether this court should believe SP4 when he said that the deceased was employed in the restaurant at Mersing. SP4 came and gave evidence and his performance in the witness box was in the circumstances quite bad. It was uneventful. But most witnesses are afraid to come to court and give evidence. This court is the fountain of justice where litigants look up to. I am prepared to accept the evidence of SP4 to the effect that the deceased was employed as a waitress in the restaurant in Mersing. But I am

not prepared to accept that the deceased was paid RM1,500 per month as a waitress in Mersing – a godforsaken place. SP4 did say that the restaurant business suffered losses and that being the case it would be highly improbable that the deceased was earning RM1,500 per month as a waitress there.

In my judgment, it would be reasonable if the earnings of the deceased as a waitress in Mersing be computed at RM800 per month. From this figure, a sum representing RM400 ought to be deducted as the deceased's living expenses as required under s. 7(3)(iv)(c) of the Civil Law Act 1956. To me this would be the appropriate approach to adopt. The sum of RM400 can be said to be a wholly reasonable sum bearing in mind that she had to stay in Mersing and being away from her family she would naturally have incurred expenses in terms of lodging, travelling and daily sustenance. This is the right approach to adopt. In *Amar Singh v. Chin Kiew* [1960] MLJ 77, 79 the court there held that in arriving at a reasonable sum as the basis for dependency, the deceased's own expenses must be deducted. It would also be irrelevant in determining the dependency claim to take into account SP3's income. Thus, I computed the dependency claim of the first plaintiff using the multiplicand of RM400 per month with the multiplier of nine years which gave the figure of RM43,200.

Learned counsel for the first plaintiff had submitted that the multiplicand for the dependency claim should be RM800 per month but the amended statement of claim in bundle "AB" at p. 9 thereof itemised it at RM600. For the reasons which I have stated earlier, I awarded the first plaintiff a sum of RM43,200 for dependency claim for himself and his two children.

Datin Blanche Oleary advanced an argument that the first plaintiff ought to be allowed the cost of the baby sitter at RM300 per month under the amended s. 7(3) of the Civil Law Act 1956. The amended statement of claim at bundle "AB" listed the ages of the infant children as follows:

(a) Low Su Ghee at 13 years old; and

(b) Low Yong Hun at 8 years old,

and it was suggested that using the multiplier of 6 years the quantum for the cost of baby sitter would be RM21,600 on the basis of the following calculation:

RM300.00 per month times 6 years equals RM21,600.00.

It was argued that the sum of RM21,600 was for expenses incurred as a result of the first defendant's negligence. Datin Blanche Oleary relied on the authority of the Court of Appeal in *Neo Kim Soon (Pentadbir kepada Harta Pusaka Phanna Manneechuang, Simati) v. Subramaniam Ramanaidu & Anor* [1996] 1 CLJ 730 to support the first plaintiff's claim for the cost of the babysitter.

Mr RA Kumar strenously objected and he too relied on *Neo Kim Soon's* case to argue that such a claim was a claim for special damages which must be specificially pleaded and proved. Mr RA Kumar submitted that the amended statement of claim in bundle "AB" was totally silent in regard to the cost of employing a babysitter and to make matters worse, the evidence in support in this direction was wholly inadequate and, consequently, it was submitted that the claim for the cost of the babysitter should be dismissed. In rebuttal, Datin Blanche Oleary argued that the claim for the cost of the babysitter was allowable under s. 7(3) of the Civil Law Act 1956 and it was a claim for general damages which need not be pleaded specificially.

All these arguments were indeed interesting. Shankar JCA in delivering the decision of Neo Kim Soon alluded to the statement of claim which specificially pleaded that the plaintiff in that case brought the action in his capacity as the administrator of the deceased's estate was under s. 7 of the Civil Law Act 1956 and that it was brought on the plaintiff's own behalf as the lawful husband of the deceased and on behalf of his son. Likewise in the present case, there was a striking similarity with Neo Kim Soon. As I said the first plaintiff in the present case instituted this action, being the husband of the first deceased, for himself as well as for his two infant children under s. 7 of the Civil Law Act 1956 together with special damages.

In *Neo Kim Soon's* case, the plaintiff gave evidence that by reason of the death of his wife he had to employ and would have to continue to employ a housekeeper to look after his infant son at a monthly wage of RM500. The sessions court judge awarded the plaintiff a monthly expenditure of RM250 for a period of 11½ years. But the High Court Judge disallowed the claim and on appeal, the Court of Appeal (per Shankar JCA) reinstated the judgment of the Sessions Court Judge. It must be emphasised that evidence was led in Neo Kim Soon in regard to the plaintiff's employment of a housekeeper to look after his son as the plaintiff was then 63 years of age. In the present case too, especially at p. 28 of the notes of evidence, the first plaintiff testified that after the death of his wife, he had sent his children to be taken care off by a babysitter and that the cost of the babysitter that was incurred by him was RM300 per month. Surprisingly, there was no cross-examination of the first plaintiff in regard to the employment of the babysitter and so to say that the evidence was wholly inadequate would not do justice to the first plaintiff at all. There was evidence of sending the two children to a babysitter and it cost RM300 per month. To me that would be evidence that should be considered by this court and the claim under this head need not be specifically pleaded as it falls under the category of general damages. In my judgment, the claim for the cost of employing a babysitter at the cost of RM300 per month that was incurred by the first plaintiff was recoverable under s. 7(3) of the Civil Law Act 1956 and also on the authority of Neo Kim Soon. Datin

Blanche Oleary suggested a multiplier of six years on the multiplicand of RM300 per month and I agreed to her suggestion and made an order that the first plaintiff was entitled to recover RM21,600 for the cost of employing a babysitter to take care of the two children.

The first plaintiff too should be entitled to claim as damages for bereavement under s. 7(3A) read with s. 7(3B)(a) of the Civil Law Act 1956 the sum of RM10,000. I made an award accordingly.

The funeral expenses being special damages was pleaded and quantified by the first plaintiff at RM3,770. In the course of the trial, the first plaintiff testified at p. 28 of the notes of evidence that he merely incurred RM3,000 to bury his dear wife and I so awarded him forthwith. For the costs of the police report and the postmortem report, I awarded RM14 and RM40 respectively.

To summarise, I awarded the following sums to the first plaintiff:

(a) dependency claim	:	RM43,200.00
(b) employing a babysitter	:	RM21,600.00
(c) bereavement	:	RM10,000.00
(d) funeral expenses	:	RM 3,000.00
(e) police report	:	RM 14.00
(f) postmortem report	:	RM 40.00
		RM77,854.00

Quantum

The Second Plaintiff (Leong Hock Seng)

The Third Plaintiff (Ling Gun Sang)

The second and third plaintiffs were the parents of the driver of the motorvan, Leong Poh Heng, who died as a result of the road accident. The deceased was 25 years of age at the time of his death as set out in the death certificate at p. 7 of bundle "AC". The amended statement of claim in bundle "AB" itemised the income of the deceased at RM2,900 per month and from this sum it was said that the deceased contributed RM1,500.00 per month to his parents. SP4 (the second plaintiff), SP5 (the third plaintiff), SP6 (Wong Cher Hwa) and SP7 (Leong Poh Heng) gave evidence in regard to the earnings of the deceased. Their evidence showed that the deceased's earnings were from three sources:

(a) Sing Keong Store at RM1,500 per month;

(b) Nanyang Co. at RM800 per month; and

(c) Winner Karaoke at RM600 per month with a share of the tips.

The defendants, in the course of the trial, tendered exhs. "D4" and "D5" being the income tax Forms J for the years of assessments for 1991 and 1992 and it clearly showed the deceased's income as follows:

(i) 1991 - RM11,167.00 or RM930.58 per month.

(ii) 1992 - RM12,788.00 or RM1,065.67 per month.

The Supreme Court in *Chua Kim Suan & Teoh Teik Nam (Suing As Administratrix And Administrator Respectively Of The Estate Of Teoh Tek Lee, Deceased) v. Government of Malaysia & Anor* [1994] 1 CLJ 321 laid down the principle that the court should give due weight to all the evidence adduced in respect of earnings and should consider the income tax returns with an open mind. The Supreme Court too laid down the principle that any claim for loss of earnings from any illegal source should not be allowed as it was against public policy. With these principles in mind, I will now proceed to examine the earnings of the deceased from the three named sources.

Income From Sing Keong Store

Both SP4 and SP7 gave evidence in regard to the deceased's earnings from Sing Keong Store. SP4, the deceased's father, held a 50% share in Sing Keong Store while SP7, the deceased's elder brother, held 25% of the share in Sing Keong Store. Both SP4 and SP7 categorically said that the deceased was paid RM1,500 per month but they were unable to produce any supportive documentary evidence to that effect and they said that Sing Keong Store was destroyed in a fire. SP7 undertook in the course of giving evidence as seen at pages 89 and 90 of the notes of evidence to produce the EPF and the SOCSO records of the deceased but he failed to do so. That being so, it was urged upon me to draw an adverse inference and invoke s. 114(g) of the Evidence Act 1950.

Income From Nanyang Co

The evidence in regard to this came from SP7. He again confirmed that Nanyang Co did pay SOCSO and EPF for the deceased and he undertook to produce them but he failed to do so. I was then invited to invoke s. 114(g) of the Evidence Act 1950.

Of interest to note would be the absence of other documentary evidence from Nanyang Co as it was alleged that all the documents were destroyed in a fire earlier than the fire at Sing Keong Store.

Income From Winner Karaoke

SP6 took the stand and gave evidence on this source of income. A partnership agreement at pp. 36 to 42 of the bundle "AC" showed the names of the partners and the terms of the partnership agreement. The deceased contributed RM5,000 to this partnership and he held 1/7 share. The total share capital of the partners in the Winner Karaoke amounted to RM35,000. It is pertinent to note that SP6 testified that the deceased was paid RM600 per month for this joint venture and the deceased too was said to receive a share of the tips amounting to RM300 to RM800 per month.

The partnership survived and the enterprise was not destroyed by fire but, unfortunately, SP6 failed to produce the following documents:

(a) liquor licence;

(b) licence from the local authority;

(c) service tax licence; and

(d) the relevant accounts.

Perusing through the notes of evidence especially at pp. 72 to 73, there was an undertaking by SP6 to produce certain documents which admittedly were in the possession of SP6. But as the trial continued, SP6 failed to produce those documents. This court was then urged to draw an adverse inference under s. 114(g) of the Evidence Act 1950.

Section 114 of the Evidence Act 1950 enacts that the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case. The relevant illustration would be illus. (g) which enacts that:

> The court may presume –
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

and this illustration has been the subject of much judicial review over the years and it would continue to be analysed and deciphered in the years to come.

The illus. (g) refers to the presumption raised from not only wilful withholding of evidence but also from spoliation. The word "spoliation" connotes a whole gamut of the following negative acts like destruction, mutilation, suppression and fabrication of evidence. It is quite natural that the suppression or destruction of useful evidence would lead to the inference, nay an irresistible one, that the evidence if produced would go against the party who withholds it: omnia praesumuntur contra spoliatorem. Thus, whoever withholds evidence, the presumption to his disadvantage will be vigorously adopted (*Williamson v. Rover Cycle Co* [1901] 2 IR 619). A word of caution must be registered and that is this. That an adverse inference can be drawn only if there is withholding of evidence and not because of the failure to obtain evidence (*Srichand v. S* [1967] AII SCC 450). Instances where the presumptions have been invoked are quite numerous. Suffice for this exercise that a few of them will be itemised here:

(1) withholding material documents by a party in possession of those documents (*Atyam v. Pechitti, A* 1966 SC 629; *Ramdas Oil Mills v. Union, A* [1977] SC 638; *Pillai v. Dangal, A* 1942 R 52; and *Rangabati v. United Bank, A* 1961 P 158).

(2) non-production of an important witness notwithstanding that the other side was not called upon to produce that evidence (*GG in Council v. Ranglal, A* 1948 P 237; and *Irudayam v. Salayath, A* 1973 M 421).

(3) the failure of the defendant as the government to produce reports and documents kept by the government (*S v. Modern Cultivation, A* 1965 SC 17).

(4) the failure to produce title deed in a claim for right of way (*Vinayak v. Collector of Bombay* 26 B 339, 351).

(5) non-production of account books by the party having custody of them (*Debendra v. Narendra,* 24 CWN 110, 30 CLJ 417).

(6) non-production of the insurance policy (*G Krishna Rao v. Chalasani Pooranchandra, A* [1987] Ori 18, 19, [1986] 1 Ori LR 554).

Back home, Mohamed Azmi SCJ in *Munusamy v. PP* [1987] 1 MLJ 492, 494 (SC), in style, sets out the scope and ambit of s. 114(g) of the Evidence Act 1950 in these lucid terms:

> It is essential to appreciate the scope of section 114 (g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

It was submitted that in view of the unsatisfactory nature of the other evidence, this court ought to adopt the deceased's income as shown in his income tax returns. This was the same approach which I adopted in *Ng Aik Kian & Anor v. Sia Loh Sia* [1997] 2 AMR 1996 where at p. 2021 of the report in deciding the earnings of the plaintiff, I had rejected the other evidence and found the plaintiff's income as declared in the income tax returns.

Now, in regard to all the three businesses there was evidence emanating from SP4 and supported by SP5 and SP6 to the effect that the deceased was receiving income from all the three businesses. SP6 as the business partner of the deceased in Winner Karaoke gave evidence that the deceased's income from that business was about RM1,400 a month. The deceased involvement in Winner Karaoke was supported, as I said, by a partnership agreement and the deceased played a major role as the managing partner. SP6 too confirmed the deceased's involvement in Winner Karaoke by way of a partnership agreement.

The deceased's incomes from Sing Keong Store and Nanyang Co were confirmed by both SP4 and SP5 and it was further supported by the evidence of SP7 who was also involved in the said businesses. Two exhibits need to be highlighted here. One was exh. P9, a business registration bearing number 228671 of Sing Keong Store with the deceased as the owner/partner of the business and the residential address of the deceased was listed as at no: 47, Jalan Dato' Mohd Ali, 86900 Endau, Johor and this address too was the business address of Sing Keong Store. The type of business of Sing Keong Store was listed as:

> Jualan Runcit kain-kain.
>
> Pakaian dan alat-alat Pesolek.

In short, exh. P9 emanated from the Registrar of Business and it gave a stamp of legality to the business of Sing Keong Store. The other exhibit that needed to be mentioned would be exh. P10, a document from the Registrar of Business on Nanyang Co. The business address of Nanyang Co. was at no: 20, Jalan Dato' Md Ali, 86800 Mersing, Johore and the company started its operation on 1 November 1958. Nanyang Co dabbled in textile goods. There were three partners in Nanyang Co, namely the deceased himself, Leong Poh Meng (SP7) and Leong Keng Cheong. These were the details of Nanyang Co as seen in exh. P10 and these were said to be the latest available information of the said company. The stamp of legality of the existence of Nanyang Co on the strength of exh. P10 can never be doubted.

According to SP7, the deceased was receiving a monthly income of about RM1,500 from Sing Keong Store and RM800 from Nanyang Co.

As the parents and dependants of the deceased, both SP4 and SP5 gave evidence that they received financial support of about RM500 and RM1,000 respectively from the deceased from the three businesses alluded to earlier. SP4 received a sum of RM500 a month for his own expenses from the deceased. Under cross-examination, SP4 admitted that he too was involved and received income from his involvement in Nanyang Co. and Winner Karaoke when the deceased was still alive. In my judgment, any income received by SP4 from his own business venture does not prevent him from being a dependant and a rightful claimant for the loss of support as a result of his son's death under s. 7(2) of the Civil Law Act 1956 (*Muhamad Hashim (Bapa Noor Azlan Muhamad (Simati) Bertindak Bagi Pihak Tanggungan) v. Teow Teik Chai & Anor* [1996] 1 CLJ 615).

As I said, I was invited to draw adverse inferences under s. 114(g) of the Evidence Act 1956 in regard to the failure to produce the relevant documents of the three businesses and I declined to do so. The legitimacy of the three businesses can never be doubted. Both Sing Keong Store and Nanyang Co. had exhs. P9 and P10 which showed beyond doubt as to the existence of the businesses. The existence of the Winner Karaoke was backed up by the partnership agreement. I accepted the evidence that Sing Keong Store and Nanyang Co. were razed by fire. Leong Poh Meng (SP7) lodged a police report on 14 July 1995 at 11.28 a.m. in regard to the fire that razed Sing Keong Store. That police report was marked as exh. P11 and it was worded as follows:

> Pada jam lebih kurang 2.00 pagi 14.7.95 saya telah diberitahu olih seorang kawan bahawa kedai saya yang beralamat SIN KEONG STORE No. 47, Jalan Dato Mohd Ali, Endau, Johor, telah terbakar dan tidak dapat diselamatkan. Kerugian ditaksirkan lebih kurang RM387,000.00. Mengikut pecahan adalah seperti berikut:- (1) Barang-barang Stok RM158,000.00; (2) Peralatan perabot dalam kedai RM109,000.00; (3) Bangunan RM120,000.00; (4) Talipon serta dokumen penting seperti cukai pendapatan, bil TNB, JBA, STM dan Buku-buku Akaun untung rugi, (2) buku cek Public Bank Endau dan Mersing, Statement Bank tersebut, Lesen perniagaan dan daftar perniagaan. Inilah pengaduan saya.

And it would be apparent that the losses in terms of money were quite substantial. Not only that, certain valuable documents too were destroyed in the fire.

Now, when witnesses came to court and said that:

(1) from Sing Keong Store, the deceased was paid RM1,500 per month;

(2) from Nanyang Co, the deceased was paid RM800 per month; and

(3) from Winner Karaoke, the deceased was paid RM600 per month and the deceased also received tips of between RM300 to RM800 per month,

must this court refuse to accept the assertions of the witnesses? Certainly not.

Again, when SP4 and SP5 testified that they each received RM500 and RM1,000 from their deceased's son on a monthly basis before their son died in that unfortunate road accident due to the sole negligence of the motorlorry trailer, must this court refuse to accept their evidence? As the fountain of justice, this court must give credence to the testimonies of SP4 and SP5. This court unhesitantly accepted the evidence of both SP4 and SP5 in regard to their deceased son's monthly contributions to them.

I am aware that the income tax Forms J of the deceased for the years of assessments for 1991 and 1992 showed income at RM930.58 per month for 1991 and RM1,065.67 per month for 1992. I am reminded of the sage words of Peh Swee Chin SCJ in *Chua Kim Suan's case [supra]* where his Lordship emphasised that it was a "national pastime" to avoid paying income tax and this court must have an "open mind" when assessing damages. This was what his Lordship said at pp. 326 and 327 of the report:

> She then referred to the average monthly figure of the taxable income from the Inland Revenue's bill to the deceased tax-payer, and adopted this average monthly figure of RM866.79. The inference seems to be that she felt bound to accept this figure from the Inland Revenue's source. The difference between RM898.00 and RM866.79 is small but a question of principle thus arises. Is a court bound by such similar figure?
>
> We do not think that any court is bound by such a figure; it is relevant for cross-examination and for consideration by the Court as to any probability of any income figure claimed by a plaintiff in evidence. The jocular and popular expression of the 'national pastime' of (legitimate) avoidance of income tax liability comes to mind in the sense of getting income exempted from income tax thereon under various provisions of income tax legislation. Further a court has to act on evidence adduced before it, and to give any due weight, if any, to it. A Court should regard such similar figure from any similar notice of assessment as *res inter alias* and consider the evidence with an open mind.

I accepted with an **"open mind"** the evidence of SP4 that the deceased gave him RM500.00 per month before the deceased met his death. I too accepted with an **"open mind"** that SP5 received RM1,000 per month from her deceased's son before he met his death. It was my judgment that both SP4 and SP5 succeeded in their dependency claims.

For SP4, using the multiplicand of RM500 per month on the multiplier of 7 years, a sum of RM42,000 would be the amount due and forthcoming to him (RM500 x 7 = RM42,000) and I awarded him accordingly.

a As far as SP5 was concerned, she would be entitled to the following sum. Based on the multiplicand of RM1,000 per month with a multiplier of 7 years, she should be entitled to RM84,000 (RM1,000 x 7 = RM84,000). I made an award of this amount in her favour.

b I too awarded bereavement to both SP4 and SP5 at RM10,000. According to SP4, he incurred RM3,500 for funeral expenses for the deceased and this piece of evidence can readily be seen at p. 37 of the notes of evidence. But the amended statement of claim at bundle "AB" quantified the funeral expenses at RM3,000. I would go along with the evidence of SP4 and award him RM3,500 for the funeral expenses of his son – the deceased. It was a *c* reasonable amount.

I too awarded both SP4 and SP5, RM40 for the purchase of the post-mortem report. This was also the very amount quantified in the amended statement of claim.

d In summary, I awarded the following sums to both SP4 and SP5:

(a) dependency claim of SP4	-	RM 42,000.00
(b) dependency claim of SP5	-	RM 84,000.00
e (c) bereavement	-	RM 10,000.00
(d) funeral expenses	-	RM 3,500.00
(e) post-mortem report	-	RM 40.00
		RM139,540.00

f

For the varied reasons as adumbrated above, I gave judgment to the first plaintiff, the second plaintiff and the third plaintiff with costs.

Interest

g General damages should carry interest at 8% per annum from the date of the service of the writ till the date of judgment. Special damages, on the other hand, will attract interest at 4% per annum from the date of the accident to the date of judgment. I too awarded interest at the rate of 8% per annum on the whole judgment sum from the date of judgment till the date of payment *h* as provided for under O. 42 r. 12 of the Rules of the High Court 1980. As for costs, I ordered that it should be taxed and it should go to the first, second and third plaintiffs.

i